No. 03-1676

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES J. HAYES,

Petitioner,

v.

NICE SYSTEMS, LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS NICE SYSTEMS LTD., BENJAMIN LEVIN AND AVRAHAM LAZAR

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Disturbing the decision below would require this Court to answer several questions in the affirmative, when each of those questions clearly merits a resounding "*no*":

1. Should a lone shareholders' activist be allowed to highjack a multi-million dollar settlement approved by 99.99% of the Class, in the hopes of rewriting the securities law into a system of "no-fault" insurance for investors?

2. Is a District Court required to absolutely calculate with scientific precision each individual shareholder's damages before approving the class-wide settlement of those claims?

3. Is it an abuse of discretion for a District Court to entertain a rebuttable presumption of fairness to a class action settlement reached at arms' length by experienced counsel after sufficient discovery has been conducted and where only a small fraction of the class objects?

4. Is it an abuse of discretion for a District Court, in evaluating the economics of a proposed settlement, to adopt the opinion of an economics expert over the unsupported speculation of a lone Objector who admits that he is not an expert?

5. Is it improper for a Court of Appeals to consolidate (i) the review of a District Court decision overruling objections to a class action settlement with (ii) the review of a motion for reconsideration of that same decision, where there was no "newly discovered evidence" presented to the District Court?

6. May a Petition for Certiorari present entirely new arguments and issues never raised in the Court of Appeals and the District Court?

COUNTER-STATEMENT OF THE PARTIES

1. Petitioner-Objector Hayes

Petitioner James J. Hayes is an NSL shareholder who objected in the District Court to the class action settlement.

2. Respondents-Plaintiffs

Respondents-Plaintiffs are those who were collectively named "Lead Plaintiffs" by the District Court: Afikim Management; Adrian Byrne; Dresdnerbank Investment Management; and E.H. Tepe Company, Inc.

3. Respondents-Defendants

Hayes lists in his Petition the following Respondents-Defendants:

NICE Systems Ltd.,
Nice Systems, Inc.,
Lauri A. Hanover,
Daphna Kedmi,
Avraham Lazar,
Benjamin Levin,
Haim Shani, and
Yuval Yanai.

However, four of those persons (presented immediately above in italics) are not proper Respondents as they were never before the Court of Appeals and, in fact, were voluntarily dismissed from the District Court proceedings long before the settlement was ever proposed or approved. Petitioner never below disputed the dismissal of those persons, and did not seek to name them as respondents before the Court of Appeals.

In addition, two persons, Mordechai Golan and David Ben-Zeev, appeared as appellees before the Court of Appeals but are not named as Respondents in the Petition.

CORPORATE DISCLOSURE STATEMENT

1. NICE Systems Ltd.

Respondent NICE Systems Ltd. ("NSL") hereby identifies the following parent corporations:

None.

Respondent NSL hereby identifies the following publicly-held companies that own 10% or more of NSL's stock:

None.

2. Nice Systems, Inc.

To the extent that Nice Systems, Inc. is deemed to be a Respondent herein, Nice Systems, Inc. hereby identifies the following parent corporations:

NICE Systems Ltd.

To the extent that Nice Systems, Inc. is deemed to be a Respondent herein, Nice Systems, Inc. hereby identifies the following publicly-held companies that own 10% or more of Nice Systems, Inc.'s stock:

NICE Systems Ltd.

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COUNTER-STATEMENT OF THE CASE

The Petition seeks review of the decision of the Court of Appeals for the Third Circuit which affirmed the District Court's approval of a $10 million class-action settlement. Notably absent from the Petition, or summarily swept aside, are several important points:

- the settlement was reached only after investigation and arm's-length negotiation by a cadre of experienced counsel, and overwhelmingly embraced by 99.99% of the Class;[1]

- before the fairness hearing, Petitioner and his counsel submitted written memoranda describing Petitioner's economic theories and arguments in great detail;

- at the fairness hearing, Petitioner appeared and was given sufficient time in which to expand upon his arguments;

- in approving the settlement, the District Court issued a well-reasoned and meticulously-supported opinion (the "District Court Decision") which clearly evinced an understanding of Petitioner's arguments;

- Petitioner's request for reargument of the District Court's Decision was denied because the "newly discovered evidence" was fully disclosed in the original class notice;

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[1] No class members asked to be excluded from the class (SA 315-16 (Gross Decl. ¶¶ 5-7); SA 374-75 (Tran. at 6:16-7:3)), and objections were interposed by only two shareholders – representing approximately one one-hundredth of one percent of the class (A 31-32 (District Court Decision at 12:12-13:11)).

- the Court of Appeals for the Third Circuit found no abuse of discretion and unanimously affirmed the District Court's fact-based fairness evaluation; and

- the Third Circuit subsequently found no grounds for reargument or rehearing *en banc*.

The Petition does not demonstrate that the Court of Appeals transgressed any Supreme Court decision or Constitutional mandate. Nor does the Petition reveal any disagreement among the Circuits regarding the controlling law. That is so because it is not a *legal* principle which truly undergirds the Petition. Instead, Petitioner argues that "it is in the nation's *economic* interest that this Court hear this appeal. . . ." (Pet. at 12) (emphasis added). As Petitioner describes it, "this Court has a unique opportunity to . . . benefit National wealth by improving the efficiency of the Nation's securities markets." (Pet. at 28).

In the District Court, Petitioner conceded that he is not a devotee of the rule of law currently applicable to securities class actions, but instead is a long-time shareholders' activist who wants to rewrite federal securities law into a system of "no-fault" insurance for public investors, in which no settlement providing for less than 100 cents on the dollar is ever acceptable – using those very words. (SA 400-402 (Tran. at 32:22-34:11)).[2]

And just as he unsuccessfully urged the District Court and the Court of Appeals, Petitioner suggests that this case presents this Court with a "wonderful opportunity" to rewrite the securities law to comport with Petitioner's dream of no-fault investors' insurance. (Pet. at 15). To achieve this end, Peti-

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[2] Citations herein to "SA __" refer to the Supplemental Appendix filed with the Court of Appeals on September 4, 2003. Citations to "A __" refer to the Appendix filed with the Court of Appeals on July 28, 2003.

tioner asks this Court to create a host of entirely new duties for District Judges in evaluating class action settlements, and to erect entirely new obstacles to the settlement of complex litigation.

Petitioner first argues that District Courts should be forced to abandon the customary practice of weighing the adequacy of a proposed settlement against estimates of aggregate damages allegedly suffered by the class. The claimed impetus for this sweeping reform is Petitioner's argument that certain methodologies currently used to estimate aggregate damages do not comport with the standards for the admission of scientific evidence under *Daubert* and its progeny.[3] But even if that were assumed to be true, it does not follow that methodologies which are inadequate as a means to calculate with scientific precision an award of damages at trial are somehow inappropriate in estimating aggregate damages to be weighed against a proposed settlement fund.

Of course, the determination at trial of securities damages is a complex inquiry usually giving rise to competing expert opinions and proofs. Forcing this exercise to be completed with scientific precision before any settlement could be judicially-approved would frustrate any possibility of early settlement – a result directly contrary to this Court's stated policies. For this very reason, virtually every Circuit commands that District Courts weigh the difficulty of calculating and proving damages as an essential element of examining the fairness and adequacy of a proposed settlement, exactly as was performed below. Requiring the scientific calculation of damages before a proposed settlement can be approved would excise this important test from existing law and practice.

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[3] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Moreover, it has always been the case that objectors to any proposed settlement have the opportunity to appear and challenge on any grounds the proffered estimates of aggregate damages. Indeed, Petitioner appeared in the District Court and challenged the damage estimates in this very case, and volunteered his own competing estimates and calculations of aggregate damages. It simply was the case that the District Court – and 99.99% of the rest of the Class – did not share Petitioner's contrary views and instead adopted Plaintiffs' expert's estimates. In this way, the process worked exactly as it should.

Petitioner next takes issue with the rebuttable presumption of fairness that the District Court applied in evaluating this settlement. Because that presumption stood upon a firm foundation in controlling precedent, Petitioner cannot argue that the presumption was invalid from the outset. Instead, Petitioner argues that the presumption should be effective only during the preliminary approval given to a proposed settlement, when a settlement class is provisionally certified, and then *must* fall away when the final evaluation of the settlement is undertaken. Continuing to embrace such a presumption during final evaluation, Petitioner argues, mandates that every settlement – even bad ones – will be judicially approved.

Petitioner apparently misunderstands the difference between a rebuttable and an absolute presumption. The presumption applied by the District Court was a rebuttable presumption, exactly as the Third Circuit has directed in the very authorities upon which Petitioner relies. The District Court simply found that Petitioner's admittedly non-expert opinions and speculation did not warrant rejection of the settlement, and the Third Circuit saw no reason to disturb that factual finding.

Petitioner's next grievance is that it was error for the District Court to reject Petitioner's competing economic theory about the "Efficient Market Hypothesis" and his modeling of the proposed settlement, and it equally was error for the Court

of Appeals to not "correct" this. But Petitioner did not present any competent expert testimony to the District Court in support of his position. Instead, Petitioner merely recited – exactly as he does in the Petition – his subjective belief about economic theories, all the while admitting that he is not an expert in the field. It certainly was not an abuse of discretion for the District Court to accept Plaintiffs' proffered expert testimony over the lay opinion of Petitioner on such a technical issue. And it was not error for the Court of Appeals to decline to disturb this inherently fact-based determination.

As to the remaining elements of the Petition, Petitioner failed to raise those arguments below. As such, it respectfully is submitted that they too provide no basis for the issuance of a writ.[4]

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[4] The Petition contains many misstatements of the record and about the underlying facts of this litigation. For the sake of brevity, this response addresses only those matters which are necessary for the evaluation of the Petition.

ARGUMENT

I. PROSCRIBING AGGREGATE DAMAGE ESTIMATES WOULD NEEDLESSLY FRUSTRATE SETTLEMENTS AND PROVIDES NO BASIS FOR A WRIT.

Petitioner asserts that aggregate damage calculations are not reliable enough to pass muster under *Daubert*,[5] and therefore may not be used in evaluating the fairness of class action settlements. Petitioner relies for this proposition solely upon the opinion in *Kaufman v. Motorola, Inc.*, No. 95 C 1069, 2000 WL 1506892 (N.D. Ill. Sept. 21, 2000), where the District Court for the Northern District of Illinois determined that aggregate damage estimations using the Proportional Trading Model ("PTM") are inadmissible under Federal Rule of Evidence 702 and *Daubert*, and thus could not be used to prove actual damages at trial. The *Kaufman* Court therefore granted a motion in limine to preclude testimony to the jury concerning aggregate damages estimated through that trading model.

But the ultimate determination of "actual damages" to be awarded after trial is simply not a prerequisite to finding a settlement fair and adequate. In determining the fairness of a proposed settlement, the trial court is not to conduct a trial, nor to finally determine any issues going to the merits of the claims:

> It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.

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[5] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977) (quoted in *In re Cendant Corp. Litig.*, 264 F.3d 286, 301 (3d Cir. 2001)).[6]

Thus, rather than calculating "*actual damages*," as is required in a full trial of a securities claim,[7] a proposed settlement is to be weighed against only the "*likely rewards*" of trial.[8]

> [C]ases in which courts have approved settlements based upon aggregated damages . . . are distinguishable [from cases where aggregate damage calculations may not be presented to the jury] because settlements are evaluated under a different set of considerations. *See In re Cendant Corp. Litigation,* 264 F.3d 201, 231-32 (3d Cir. 2001) (listing nine *Girsh* factors for determining whether a proposed class-action settlement is fair, reasonable and adequate). Indeed, one of the *Girsh* factors is the risk of establishing damages at trial.

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[6] *See also Girsh v. Jepson*, 521 F.2d 153, 160 (3d Cir. 1975) ("[W]e [do not] suggest that a record appropriate to a trial on the merits is required. We recognize that the task of the district court is to determine whether the proposed settlement should be accepted and approved – a determination substantially different than a decision on the merits.").

[7] Only "actual damages" may be awarded at trial under Rule 10b-5. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 155 (1972); *Rowe v. Maremont Corp.*, 850 F.2d 1226, 1240 (7th Cir.1988); Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a).

[8] *See, e.g., Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968) ("compare the terms of the compromise with the *likely* rewards of litigation") (emphasis added); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 782 (3d Cir.1995) ("settlement [requires] inquiry into the terms of the settlement relative to the *likely* rewards of litigation") (emphasis added) ("*G.M. Pickup*").

Bell v. Fore Systems, Inc., No. Civ.A. 97-1265, 2002 WL 32097540 at *4 (W.D. Pa. Aug. 2, 2002).

If Petitioner were correct, then virtually every decision approving a securities class action settlement in recent years was error, because they each have relied upon aggregate damage calculations in weighing the fairness of the settlement:

> Lead Plaintiffs . . . recognize that the trading model used to estimate damaged shares is just that – a model: "Because this is a model, it will not replicate specific actual trades, like the [objector's] stock sales; indeed the model may overstate activity on some days during the Class Period, and understate activity on other days." [Lead Plaintiffs] go on to assert that "trading models are accepted as providing reasonably accurate predictions of trading activity over a period of time and are customarily used to estimate trading activity for the purposes of calculating damages in securities fraud cases.". . .
>
> The Court agrees with Lead Plaintiffs. The use of trading models is accepted to create an estimate of aggregate damages. The [objectors] have given no other reason to disregard [Lead Plaintiffs' damage expert's] conclusion other than it is based on a model. Their objection is rejected.

In re Cendant Corp. Sec. Litig., 109 F. Supp.2d 235, 272 (D.N.J. 2000) (citations omitted), *aff'd*, 264 F.3d 201 (3d Cir. 2002); *see also In re Aetna Inc. Sec. Litig.*, No. CIV. A. MDL 1219, 2001 WL 20928 at *10 (E.D. Pa. Jan. 4, 2001) (approving settlement despite a "wide disparity in damage assessments" by

economic experts who "would likely have been challenged on *Daubert* or other grounds" at trial).[9]

The determination of "actual damages" in securities class actions is a complex inquiry usually giving rise to competing expert opinions and proofs. Needlessly forcing this exercise to be completed with scientific precision before any settlement could be judicially approved would frustrate any possibility of early settlement – a result directly contrary to this Court's stated policies.

II. APPLICATION OF THE REBUTTABLE PRESUMPTION OF FAIRNESS PROVIDES NO BASIS FOR A WRIT.

Of course, the judicially-favored efficiencies of early compromise would certainly be frustrated if, in order to approve a class-wide settlement, the District Court were forced to conduct a full trial on the merits. Therefore, courts initially examine the process by which a settlement was reached:

> a judge cannot really make a substantive judgment on the issues in the case without conducting some sort of trial on the merits, exactly what the settlement is intended to avoid. Instead, the court determines whether negotiations were conducted at arms' length by experienced counsel after adequate discovery, in which case there is a presumption that the results of the

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[9] Another, more practical, problem for Petitioner is that *he* proffered aggregate damage calculations to the District Court, and specifically conceded that *he* was using the very same PTM that was rejected at trial in *Kaufman*. *See* SA 354 (Hayes Mar. 28 Reply at 1) ("[T]he number of ADSs eligible for the settlement using the proportional trading model ('PTM') would be equal to the float of 7,000,000 ADSs."). Thus, Petitioner advocates for the invocation of a rule with which even he could not comply.

process adequately vindicate the interests of the absentees.

G.M. Pick-Up, 55 F.3d at 796-97.

The Third Circuit has therefore provided guidance to its District Courts, through the establishment of an initial presumption of fairness where four criteria are met:

> Before sending notice of the settlement to the class, the court will usually approve the settlement preliminarily. This preliminary determination establishes an initial presumption of fairness when the court finds that: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.

G.M. Pick-Up, 55 F.3d at 785; *accord In re Cendant*, 264 F.3d at 233 n.18.

The District Court made exactly these four findings, and therefore properly concluded that a presumption of fairness was warranted.[10] Notably, Petitioner did not below – nor in the

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[10] *See* A 31 (Decision at 12:16-25) ("[T]he approval of the class action appears to be somewhere between 99.98 and 99.99 percent of the Class. . . . [C]ertainly . . . the Class has overwhelmingly approved of the proposed settlement."); A 32-33 (Decision at 13:24-14:12) ("Here, lead plaintiffs' counsel had conducted an extensive investigation, including consulting with damage and accounting experts, analyzing the facts and circumstances of the defendants' conduct and the damages suffered by the Class. . . . As noted earlier, plaintiffs conducted due diligence, confirmatory discovery, reviewed critical documents and did depose Nice's current C.F.O. Through these efforts it is clear to this Court that plaintiffs' counsel had put itself in a position to discern the critical facts, to understand the interplay between those facts and the attendant law within the Third Circuit and to come to a reasonable determination that attempting to resolve this case short of an (continued...)

Petition – utter a single word which might undermine the four bases for that presumption.

Instead, Petitioner now argues that the presumption should be effective only during the preliminary approval given to a proposed settlement, when a settlement class is provisionally certified, and then *must* fall away when the final evaluation of the settlement is undertaken. Continuing to embrace such a presumption during final evaluation, Petitioner argues, mandates that every settlement – even bad ones – will be judicially approved.[11]

Petitioner simply misunderstands that the presumption of fairness is not absolute, but instead is rebuttable. The Third Circuit has repeatedly made this clear when, immediately after noting that a District Court has properly applied the presumption, it nonetheless evaluated whether the District Court properly applied the traditional nine factors which still have to be satisfied for final approval. *E.g.*, *In re Cendant*, 264 F.3d at 233 n.18 & 232-33. Indeed, in one of the Third Circuit cases upon which Petitioner places his greatest weight, the Court specifically cautioned that the initial presumption of fairness could be rebutted upon a proper showing:

> the possibility of rebuttal of the presumption of reasonableness must be seriously considered by the District Court. . . .

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[10] (...continued)
agonizingly long litigation process was in the best interest of the Class."); A 28 (Decision at 9:12-17) ("I note as an initial matter that it is apparent to me, based on the papers that have been submitted, that this settlement is the product of an arms'-length negotiation. Needless to say, counsel appearing on both sides in this matter are extremely able. . . .").

[11] *See* Petition at 21 (the law "require[d] the District Court to abandon its initial presumption of fairness in its final fairness deliberations").

In re Cendant, 264 F.3d at 285.

The District Court well understood this mechanism, as – even after finding the presumption was properly applied – it nonetheless embarked upon the painstaking review of the nine traditional factors set forth in *Girsh v. Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975), and carefully weighed the proposed settlement against each of them *seriatim*. (A 29-40 (Decision at 10-21)). In conclusion, the District Court found that:

> the Court, as a result of the fairness hearing held and the submissions of the parties, believes that the settlement of $10 million should be approved.

(A 55 (Decision at 36:5-7)). A final judgment of dismissal was then entered by the District Court. (SA 426-30 (Final Judgment)).

Thus, the District Court merely found that Petitioner's supposition and unsubstantiated economic theories did not warrant rejection of the settlement, and the Court of Appeals saw no reason to disturb that inherently fact-based finding.[12]

III. PETITIONER'S EFFORTS TO PRESENT EXPERT OPINION ABOUT THE EFFICIENT MARKET HYPOTHESIS PROVIDE NO BASIS FOR A WRIT.

Petitioner asserts that it was error for the District Court to reject his competing economic theories about the "Efficient Market Hypothesis" and Petitioner's modeling of the proposed settlement, and it equally was error for the Court of Appeals to

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[12] The Third Circuit has stated that a District Court's "findings required by the *Girsh* test are factual, which will be upheld unless they are clearly erroneous." *In re G.M. Pickup*, 55 F.3d at 786.

fail to disturb this factual finding.[13] Just as he did below, Petitioner fills his papers with page upon page of economic theories, speculative calculations about how quickly the trading price of NSL securities should have been impacted by adverse news, and guesstimates over how many "damaged shares" were traded during the Class Period. (Pet. at 6 & n.6, 16-19).[14] But, in addition to the utter lack of support for his many assumptions,[15] Petitioner admitted below that he is not an economist, that his only degree is in geology, and that his only qualifications for advancing his alternative economic theories and calculations are his interests as a shareholders' advocate. (SA 399, 398, 400-01 & 406 (Tran. at 31:4-9, 30:19-25, 32:18-33:5 & 38:16)).

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[13] In Petitioner's own words: "The courts below misunderstood the arguments on economic theory. . . ." (Pet. at 18).

[14] Nor has Petitioner even been consistent in his opinions. Before this Court, Petitioner opines that the adverse news must have been fully digested by the market and reflected in the trading price in only one day (Pet. at 17-18), while in the Court of Appeals he cited authority for the proposition that such adverse news may not have been fully reflected in the trading price until the passage of two trading days (Appellant's Response to Plaintiffs/Appellees' Second Amended Motion to Expand the Record, at 3 (Sept. 20, 2003) ("For negative earnings surprises, for example, the article reported that a stock price drop that 'took three to four weeks in the 1980's, it now occurs within two days.'")).

[15] Petitioner did not analyze institutional holdings which did not trade, and provided absolutely no support for his assumptions that there were 7 million ADSs outstanding and that every one of those 7 million ADSs traded during the Class Period and were held on February 8 – rendering them eligible to share in the settlement. (SA 354-60 (Hayes Mar. 28 Reply)). Nor did Petitioner provide support for his assumption that the per share inflation was $5.20. (SA 354-60 (Hayes Mar. 28 Reply)). Instead, Petitioner mechanically used the drop in price in the single day after the February 8 announcement, without performing an event study showing the huge recovery of that trading price in the immediately following days. *Id.*

In contrast, the Plaintiffs' economic expert, Mr. Marek, possessed a curriculum vitae which included formal education in economics, and research and testimonial experience directly addressed to securities litigation. The District Court learned that Mr. Marek had performed an analysis of institutional holdings and transactions in NSL ADSs to determine how many were traded during, and held through the close of, the Class Period. (SA 235-38 (Marek Decl. ¶¶ 10-14)). Through an event study, Mr. Marek also determined the impact on the trading price of the ADSs following the February 8 curative disclosure, and calculated the maximum per-share damage attributable to the alleged fraud. (SA 238-43 (Marek Decl. ¶¶ 15-25)). Thus, opined Mr. Marek, the aggregate damages to the Class were no more than approximately $15 million. (SA 243-50 (Marek Decl. ¶¶ 26-41)).

Given the dichotomy in qualifications and depth of analysis, the District Court had little trouble accepting the "conservative" opinions of Plaintiffs' damages expert over the baseless "supposition" of Petitioner Hayes:

> During the Court's colloquy with Mr. Hayes, the Court inquired, number one, of Mr. Hayes's qualifications to challenge Mr. Marek's declaration which made several assumptions leading to the damages calculations. Also, the Court inquired of Mr. Hayes whether there was any logical basis or economic theoretical basis for the Court to, essentially, reject Mr. Marek's proposal in favor of what Mr. Hayes suggested.
>
> . . . There was nothing about [Petitioner's] oral presentation or the presentation in his papers which would lead this Court to conclude that he has the ability to satisfy the Court that the conclusions that he has reached are other than conclusory assertions based on supposition and not credible economic theories that the

> Court should substitute rather than adopting Mr. Marek's assumptions and conclusions.
>
> . . . .
>
> Mr. Hayes, much to the chagrin of the Court, was unable to articulate a basis for the Court to adopt his alternate theory both with regard to the number of eligible ADSs and with regard to the $3.50 of potential damage per ADS.
>
> . . . .
>
> While as a theoretical and academic matter the colloquy was interesting, it certainly provided no basis for the Court to challenge the conclusions of Mr. Marek. Mr. Marek's declaration is impressive both in its calculations but, frankly, in the conservative manner in which he addressed the issues and came to his conclusions.
>
> I do note, more importantly, that the Court notes that Mr. Marek is a person who is eminently qualified to render the opinions that he has with regard to the settlement. . . .
>
> . . . .
>
> In other words, his specific area of expertise is exactly what is required in attempting to analyze the fairness and reasonableness of the settlement that the Court must do here.

(A 42-46 (Decision at 23:21-24:14, 24:22-25:8, 25:16-27:7)).

It certainly was not an abuse of discretion for the District Court to give greater weight to the analysis and opinions of Plaintiffs' economic expert. And it just as assuredly was not error for the Court of Appeals to fail to disturb this factual finding. This branch of the Petition therefore supplies no reason for a Writ to issue.

IV. THE THIRD CIRCUIT'S CONSOLIDATION ORDER WAS NOT A DENIAL OF DUE PROCESS AND PROVIDES NO BASIS FOR A WRIT.

Although the point heading in the Petition seems to take issue with the District Court's denial of his Rule 60 motion for reconsideration, Petitioner's arguments instead all point to the Third Circuit's decision to consolidate the appeal of that decision with the primary appeal from the underlying decision approving the settlement. (Pet. at 26-27). Petitioner claims that this consolidation was a denial of due process, because the Third Circuit supposedly did not give Petitioner an opportunity to state his "issues and arguments." (Pet. at v, 9, 27). But the notion that the Third Circuit did not know Petitioner's "issues and arguments" is utterly baseless. Petitioner was afforded a full and fair – indeed, generous – opportunity to be heard.

Petitioner was first granted additional time to serve and file his opening appellate brief. Then, the Court of Appeals granted Petitioner's motion to file a reply brief which exceeded the page limits of the Third Circuit. That reply brief specifically referenced Petitioner's "companion" appeal, *i.e.*, from the motion for reconsideration. (Reply Brief for Appellant, at 25-26 n.6 (Sept. 29, 2003)).

One week later, Petitioner filed papers with the Third Circuit in which he again described his arguments with respect to the appeal from the denial of reargument. (Appellant's Opposition to Plaintiffs/Appellees' Motion for Expedited Appeal, at 1-3 (Oct. 5, 2003)). One additional week later, Petitioner again filed papers before the Court of Appeals which further described the supposed "newly discovered evidence" supporting his request for reconsideration by the District Court, and the appeal from the denial of that request. (Appellant's Response That Notice of Appeal is Not Timely, at 2 (Oct. 15, 2003)).

Then, Lead Plaintiffs filed with the Third Circuit responsive papers which demonstrated that the "newly discovered evidence" was *not* newly discovered but, instead, was disclosed in the original class notice. (Plaintiffs'/Appellees' Response to Appellants' Jurisdictional Defect, at 2-4 (Oct. 21, 2003)). Importantly, that submission to the Third Circuit included the full transcript of the August 18 argument before the District Court on Petitioner's motion for reconsideration, in which Petitioner participated and presented all of his arguments urging reargument.[16]

Petitioner subsequently filed a letter with the Court of Appeals, again explaining the bases for his motion for reconsideration and his appeal from the denial thereof. (Letter from J. Hayes to Third Circuit (Jan. 15, 2004)). And, notably, Petitioner therein specifically joined in Respondents-Plaintiffs' request that the two appeals be consolidated. *Id.*[17]

Finally, Petitioner's request for *en banc* rehearing before the Third Circuit specifically argued about the supposed lack of formal briefing on the "second appeal," and yet again set forth therein the very arguments which Petitioner now asserts he was denied the opportunity to present to the Third Circuit. Indeed, Petitioner's submission was so swollen with argument that Petitioner again exceeded the page limits under the rules of the Court of Appeals. (Petition for En Banc and Panel Rehearing, esp. at 2-3, 16-17 (Feb. 22, 2004)).

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[16] In his Petition for En Banc and Panel Rehearing, Petitioner specifically conceded that this transcript and the corresponding arguments were provided to the Court of Appeals on October 21, 2003. (Petition for En Banc and Panel Rehearing, at 16 n.6).

[17] Petitioner stated: "The Appellant supports Plaintiffs/Appellees' desire for prompt scheduling of a briefing schedule for the second appeal and that the two appeals are consolidated for panel consideration." (Letter from J. Hayes to Third Circuit, at 1 (Jan. 15, 2004)).

Thus, the argument that Petitioner was somehow denied the opportunity to be heard is without merit.

V. PETITIONER'S REMAINING ARGUMENTS WERE NOT PRESENTED BELOW.

A. Petitioner Has Never Before Taken Issue With the District Court's Consolidation Order.

Petitioner asserts that "The District Court's first mistake was its June 22, 2001, Order that consolidated fifteen individual suits and simultaneously appointed the lead plaintiffs and class counsel." (Pet. at 22). Petitioner never made any such argument below. (Indeed, Petitioner never sought to be heard during argument and determination of the consolidation motion and the various motions to be named lead plaintiff – despite the public notices which were issued under the Private Securities Litigation Reform Act of 1995 ("PSLRA") inviting interested parties to be heard.)[18] For those reasons alone, Petitioner has waived any right to review in this Court. Moreover, Petitioner's new arguments are baseless.

Petitioner claims two grounds for relief. First, Petitioner argues that the PSLRA requires that the cases be consolidated before the lead plaintiff is named, 15 U.S.C. 78u-4(a)(3)(B),[19] while in this case those two determinations were announced by the District Court in the same written Order (Pet. at 3-4). However, that written Order reveals that the consolidation decision *was* reached first, exactly as the PSLRA requires.

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[18] The PSLRA requires public notice to be given upon the filing of the very first action, describing the process for determination of lead plaintiff. *See* 15 U.S.C. 78u-4(a)(3)(A) & (B).

[19] Petitioner erroneously cites this provision as "15 U.S.C. 78u4(3)(B)(ii)." (Pet. at 4).

(SA 1-11 (Order dated May 21, 2001)). And there is no proscription against announcing those two decisions in the same written order. To the contrary, the PSLRA requires the lead plaintiff determination to be made "as soon as practicable" after consolidation is granted. 15 U.S.C. 78u-4(a)(3)(B). Thus, far from demonstrating any error, the District Court's Order reveals scrupulous attention to the statute and an enviable alacrity of decision.

Secondly, Petitioner argues that, because the consolidated complaint was not filed until after the lead plaintiffs were named, the court could not adequately adjudge whether the lead plaintiff candidates' claims were typical of the class's. (Pet. at 3-4). Petitioner asserts that the consolidated complaint should instead be filed before any lead plaintiff is named. Petitioner does not point to any statute or decisional law to support this argument, probably because such a scheme would be directly contrary to the provisions of the PSLRA previously cited. And, of course, Petitioner's innovation would present a practical problem. Who would be allowed to interpose the consolidated complaint, if they were not yet named lead plaintiff? And because only lead plaintiff can select lead counsel, who would file it for them? Petitioner says nothing to resolve these obvious obstacles to accepting his position.

B. Petitioner Has Never Before Taken Issue With the Cover Page of the Class Notice.

For the first time, Petitioner now argues that certain disclosures about counsel fees found in the body of the class notice should also have been summarized on the cover of that notice. (Pet. at 5-6). This argument was never raised below, and is therefore waived.

Moreover, Petitioner cannot assert that he did not read the disclosures about counsel fees within the body of the notice, as his written objections to the District Court argued quite

extensively about those very disclosures. (A-47-48 (Decision at 28:24-29:6)). Over those objections, the District Court found that the class notice was sufficient to place class members on notice of the terms of the proposed settlement:

> I also note, parenthetically, that the notices that were sent out met all of the requirements of the law. . . .
>
> So it's clear to the Court that class members had an opportunity, if they so chose, to voice any objections if that was their desire.
>
> . . . .
>
> This Court concludes that there is no need to send a new notice.

(A-32 (Decision at 13:1-9); A-48 (Decision at 29:14-15)).

* * *

In claiming that the $10 million settlement was not a fair and reasonable outcome, Petitioner stands alone against the other 99.99 percent of the Class, the unanimous Panel of the Third Circuit, the District Court and controlling precedent. The reason for that stark disparity is clear. Rather than embracing a system in which the settlement of complex litigation is favored, Petitioner hopes to supplant it with a system of no-fault insurance for investors in which only 100 cents on the dollar is ever acceptable:

> [Petitioner Hayes]: . . . It's not in the economic interest of shareholders to accept a settlement less than 100 percent of their damages. . . . I think securities litigation should at some point become like an automobile accident. . . . [T]he insurance company is going to come out and pay you a hundred percent of the estimated damages.

(SA 400-02 (Tran. at 32:22-34:11, *esp.* 33:16-34:6)).

But efforts to command such sweeping reform should instead be directed to Congress – and certainly provide no justification for the issuance of a Writ of Certiorari to the Court of Appeals for the Third Circuit.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not issue.

Dated: July 22, 2004

Respectfully submitted,

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